

(2)
No. 86-1514

Supreme Court, U.S.
FILED

MAY 27 1987

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM J. CALLAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217



TABLE OF AUTHORITIES

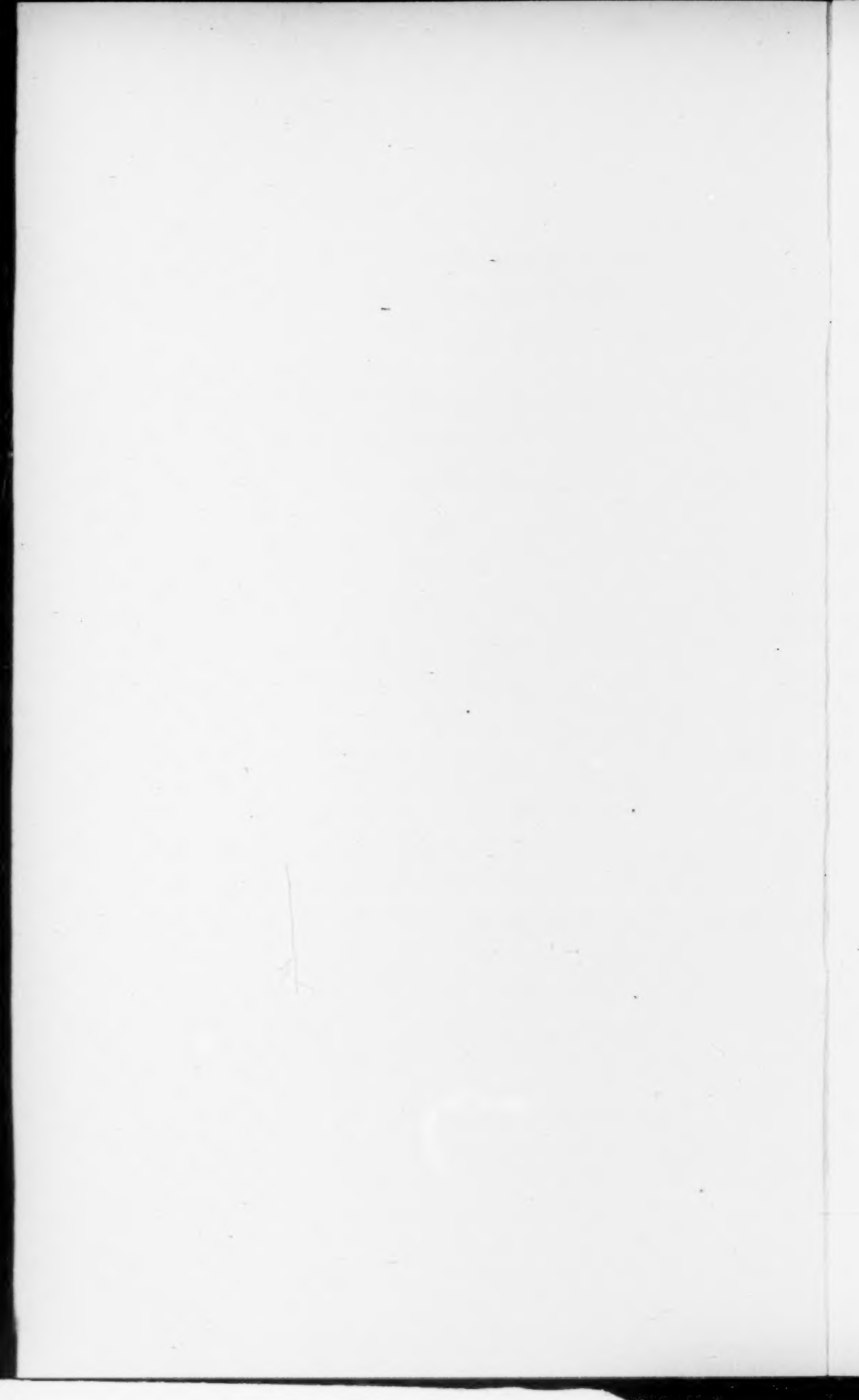
Page

Case:

<i>Hill v. United States</i> , 368 U.S. 424 (1962)	3, 4, 5
---	---------

Statutes and rule:

Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1987	5
§ 212(a)(1), 98 Stat. 1987	4
§ 212(a)(2), 98 Stat. 1987	4
§ 215(b), 98 Stat. 2015	4
§ 235, 98 Stat. 2031	2
18 U.S.C. 371	1
18 U.S.C. 656	1
18 U.S.C. (& Supp. III) 3651	3, 4, 5, 6
Fed. R. Crim. P. :	
Rule 32(a)	4-5
Rule 35	2, 4, 5
advisory committee note (1966 Amendment)	5
Rule 35(a)	1, 2, 3, 4
Pub. L. No. 99-217, § 4, 99 Stat 1728	2
Pub. L. No. 99-570, Tit. I, § 1009, 100 Stat. 3207	2



In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1514

WILLIAM J. CALLAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court's order requiring him, as a condition of probation, to pay restitution to certain persons constitutes an "illegal sentence" within the meaning of Rule 35(a) of the Federal Rules of Criminal Procedure and therefore that there is no time limit within which petitioner may move to correct his sentence.

1. In May 1984, petitioner pleaded guilty to one count of conspiring to commit wire fraud and currency offenses, in violation of 18 U.S.C. 371, and to one count of misapplying bank funds, in violation of 18 U.S.C. 656. The following month, he was sentenced to three years' imprisonment and a \$10,000 fine on the conspiracy count and to five years' probation and a \$5,000 fine on the misapplication count. In addition, as a condition of his probation, the district court ordered petitioner to pay a total of \$65,000 in restitution to three persons. Pet. App. 3-4.

2. Petitioner, a former bank officer, was convicted for his participation in a loan kickback scheme. He was originally indicted in separate pleadings in federal courts in the Southern District of Iowa and the Central District of Illinois. The five-count Iowa indictment charged petitioner with loan kickbacks and conspiracy; the four-count Illinois indictment charged him with conspiracy to commit wire fraud and currency violations, devising a scheme to defraud, and receiving fees for procuring loans (see Pet. App. 2-3). On petitioner's motion, the Iowa case was transferred to the Central District of Illinois and the two cases were consolidated. Consistently with the plea agreement into which he had entered, petitioner pleaded guilty to the first count of each of the original indictments. He acknowledged at the plea hearing that he had received a total of \$60,000 from three individuals in connection with the offenses charged (*id.* at 3-4). Following sentencing, petitioner moved for reduction of his sentence under Rule 35; the district court denied that motion (*id.* at 4).

In February 1986, 20 months after sentencing, petitioner filed a second Rule 35 motion. In that motion, petitioner alleged that the district court's order of restitution was excessive and hence that it constituted an illegal sentence that could be corrected at any time under Rule 35(a).¹ In

¹At present, Rule 35(a) provides that a "court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within [120 days after the sentence is imposed]." An amendment to Rule 35(a), however, which takes effect November 1, 1987, eliminates the temporal distinction between motions to correct an "illegal sentence" and motions to correct a sentence "imposed in an illegal manner." Pub. L. No. 98-473, §§ 215(b), 235, 98 Stat. 2015, 2031, as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728, and Pub. L. No. 99-570, Tit. I, § 1009, 100 Stat. 3207. As of November 1, 1987, Rule 35(a) will provide as follows:

(a) *Correction of a Sentence on Remand.* The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as

petitioner's view, since 18 U.S.C. (& Supp. III) 3651 authorizes district courts to order restitution only "to aggrieved parties for actual damages or loss caused by the offenses for which conviction was had," only one of the three persons to whom he had been ordered to pay restitution was "aggrieved" within the terms of that section. It was petitioner's theory that as he was sentenced to probation only on the charge that originated in Iowa, and as only one person was victimized by that offense, only one person was "aggrieved" under Section 3651. The district court rejected the factual underpinning of petitioner's motion and upheld the order of restitution to the named persons. But, because the amounts petitioner was ordered to pay to each of the three did not conform to the amounts petitioner had admitted receiving, the court corrected the original order. This modification had the net effect of reducing the total restitution from \$65,000 to \$60,000 (Pet App. 8-9).

3. On appeal, petitioner renewed his assertion that only one of the three persons to whom he was ordered to make restitution was entitled to such relief. The court of appeals did not reach the merits of petitioner's claim. Rather, the court concluded that petitioner's Rule 35 motion was more accurately described as a motion to correct a sentence imposed in an illegal manner (which must be filed within 120 days of sentencing) than as a motion to correct an illegal sentence (which may be made at any time). Relying upon this Court's decision in *Hill v. United States*, 368 U.S. 424, 430 (1962), the court of appeals explained that a "sentence

a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court —

(1) for imposition of a sentence in accord with the findings of the court of appeals; or

(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

which is in excess of that prescribed by the relevant statute is an illegal sentence within the meaning of Rule 35(a)" (Pet. App. 6). Since 18 U.S.C. (& Supp. III) 3651 "prescribes no maximum amount of restitution that may be ordered" (Pet. App. 6), the court viewed petitioner's contention—that he was ordered to pay restitution to persons not "aggrieved" by his offense—as constituting a claim "that the sentencing court incorrectly applied the statute to the facts of his case * * *. This, however, is not a claim that the sentence was illegal; it is a claim that the sentence was imposed in an illegal manner" (*id.* at 7). The court of appeals therefore held that Rule 35 set a jurisdictional time limit of 120 days following sentencing within which he could bring this claim; petitioner's failure to file his motion within the prescribed period left the district court without jurisdiction to consider the motion (*ibid.*). Accordingly, the court of appeals vacated the district court order modifying the sentence.

4. Petitioner contends (Pet. 15-21) that his Rule 35 motion was not time-barred and that the decision below conflicts with this Court's decision in *Hill v. United States, supra*. The decision of the court of appeals is correct; it does not conflict with *Hill* or with any other decision of this Court or of any court of appeals. Moreover, the present language of Rule 35(a) has been amended and 18 U.S.C. (& Supp. III) 3651 has been repealed effective November 1, 1987.² Accordingly, review by this Court is not warranted.

In *Hill*, this Court held that Rule 35, which then permitted district courts to correct "an illegal sentence at any time" did not apply to a claim by a defendant that he had been deprived of the opportunity to address the district court during sentencing, in violation of Rule 32(a) of the Federal

²The amendment of Rule 35(a) is set out at note 1, *supra*. 18 U.S.C. (& Supp. III) 3651 is repealed pursuant to Pub. L. No. 98-473, Tit. II, § 212(a)(1) and (2), 98 Stat. 1987 (Oct. 12, 1984).

Rules of Criminal Procedure. Rule 35, the Court explained, was designed "to permit correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence" (368 U.S. at 430 (emphasis in original)). Thus, the sentence in *Hill* "was not illegal" within the meaning of Rule 35, the Court stated, because "[t]he punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect" (*ibid.*).³

Here the court of appeals found, as did this Court in *Hill*, that the punishment imposed by the district court did not exceed statutory limits and was not legally or constitutionally invalid in any other respect. There is accordingly no conflict between the two cases. Moreover, as petitioner's convictions stemmed from at least one count that originated in each of the indictments and as he has admitted the unlawful receipt of funds from all three individuals to whom he was ordered to make restitution, the conditions of probation prescribed by the district court do not constitute an illegal sentence.

At all events, petitioner's dispute with the manner in which the court of appeals distinguished "illegal sentences" from sentences "imposed in an unlawful manner," does not warrant review by this Court since both the current Rule 35 and 18 U.S.C. 3651 have been repealed as of November 1, 1987. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1987, creates a new sentencing

³Congress subsequently overruled *Hill* in part by amending Rule 35(a) to its present form. The rule currently permits defendants to seek correction of lawful sentences "imposed in an unlawful manner" for up to 120 days following imposition of sentence. See Advisory Committee Note to 1966 Amendment to Rule 35, Fed. R. Crim. P.

guidelines system that will eliminate the need for either Section 3651 or the time limitation in Rule 35. The new statute provides that a sentence imposed by a district court is subject to appeal on grounds of illegality or an incorrect application of the sentencing guidelines. Consequently, as of November 1, 1987, the question presented in this case will not recur. There is, accordingly, no occasion for this Court to review a question that is of significance only to this case and will shortly be of only historical value.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1987

